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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 494

SWAYNE AND HOYT, LTD., GULF PACIFIC MAIL LINE, LTD., AND LUCKENBACH GULF STEAMSHIP COMPANY, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 35) has not been reported.

JURISDICTION

The final decree of the District Court was entered July 15, 1936 (R. 47). The petition for appeal was filed August 14, 1936 (R. 48), and an order allowing appeal and fixing bond (R. 50) was entered the same day. Probable jurisdiction was noted by this Court on November 23, 1936.

Jurisdiction of this Court is invoked under section 31 of the Shipping Act, 1916, c. 451, September 7, 1916, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830) and the Act of October 22, 1913, c. 32, 38 Stat. 220 (U. S. C., Tit. 28, Sec. 47).

QUESTIONS PRESENTED

Appellants seek to enjoin the enforcement of an order issued by the Secretary of Commerce on January 21, 1936, requiring appellants to cancel certain schedules of rates for the carriage of freight from the Gulf of Mexico to the Pacific Coast on the ground that differentials contained therein were unduly and unreasonably preferential and prejudicial in violation of Section 16 of the Shipping Act, 1916. In issuing the order the Secretary exercised statutory authority originally conferred upon the United States Shipping Board by the Shipping Act, 1916. By Section 12 of Executive Order 6166, promulgated June 10, 1933, pursuant to the provisions of Title IV of the Legislative Appropriation Act of June 30, 1932, 47 Stat. 414, as amended, the United States Shipping Board was abolished and the functions of that body transferred to the Department of Commerce.

The questions presented by the appeal are:

(1) Whether the order issued by the Secretary was supported by substantial evidence and authorized by the provisions of the Shipping Act;

(2) Whether the Secretary of Commerce was legally authorized to exercise the powers formerly vested in the United States Shipping Board.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, c. 451, September 7, 1916, 39 Stat. 736 (U. S. C., Tit. 46, Sec. 820), and the Intercoastal Shipping Act, 1933, c. 199, March 3, 1933, 47 Stat. 1425 (U. S. C., Tit. 46, Sec. 843) are printed in the appendix, infra, pp. 43–55.

STATEMENT

This is an appeal from a decree of a specially constituted three-judge district court for the District of Columbia dismissing the bill of complaint in a suit for a preliminary and a permanent injunction restraining the enforcement of an order issued by the Secretary of Commerce on January 21, 1936 (R. 34–35).

The bill of complaint was filed by Swayne and Hoyt, Ltd., Gulf Pacific Mail Line, Ltd.; and Luckenbach Gulf Steamship Co., Inc., corporations engaged in intercoastal transportation of freight from United States ports on the Gulf of Mexico to ports on the Pacific Coast via the Panama Canal (R. 1–9). The appellants collectively constitute a voluntary organization known as the Gulf Intercoastal Conference, organized pursuant to the provisions of Section 15 of the Shipping Act. The agreement under which the Conference is now operating was approved by the United States Shipping Board Bureau of the Department of Commerce on March 28, 1934, in the exercise of authority conferred by Section 15 (R. 80–84). Suit was insti-

tuted by appellants in their individual rights and as members of the Conference (R. 1–2).

Appellants named the United States as respondent pursuant to the provisions of Section 31 of the Shipping Act, 1916, c. 451, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830), Section 208 of the Judicial Code (U. S. C., Tit. 28, Sec. 46), and the Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Sec. 48) (R. 2). Jurisdiction of the district court was invoked under Section 207 of the Judicial Code (U. S. C., Tit. 28, Sec. 41 (28)), the Shipping Act, 1916, and Article I, Section 8 of the Constitution of the United States, which gives Congress the power to regulate interstate and foreign commerce (R. 2).

Pursuant to the requirement of Section 2 of the Intercoastal Shipping Act, 1933, c. 199, March 3, 1933, 47 Stat. 1425 (U. S. C., Tit. 46, Sec. 844), the Conference filed with the United States Shipping Board its tariff issued May 25, 1933, publishing certain contract rates for the transportation of west bound freight.

In the case of certain commodities, rule 53 of the tariff provided for "contract rates" which were to be enjoyed by those shippers who agreed to use exclusively ships operated by conference members for all shipments of those commodities moving by water from ports on the Gulf of Mexico to ports on the Pacific Coast. The contract rates were 10 cents per 100 pounds or $2.00 per ton lower than

the rates charged shippers who did not make such contracts (R. 53–54). By the terms of such contracts, the contract of any shipper who made any shipment in violation of his agreement became void, and the shipper was thereupon required to pay to the transporting carrier the differential between "contract" and "non contract" rates upon all shipments previously transported under the contract (R. 55).

On February 19, 1934, upon order of the Secretary of Commerce, the Shipping Board Bureau of the Department of Commerce instituted an investigation of, among other matters, the lawfulness of the "contract rate" system employed by the Conference. The proceeding was designated "Intercoastal Investigation", Docket No. 126. After public hearings had been held and exceptions of the appellants to the proposed report of the examiner had been received, a report was issued by the Secretary of Commerce on July 3, 1935 (R. 17–25), accompanied by an order requiring appellants, on or before October 3, 1935, to refrain from charging shippers who had not entered into such contracts rates higher than those charged shippers who had entered into contractual agreements (R. 5–6; 13–14).

The contract rates in effect at the time of the issuance of the order expired October 2, 1935. On September 2, 1935, appellants filed new schedules, to be effective October 3, 1935, which continued the

"contract rate" system. On September 16, 1935, the Secretary vacated his order of July 3, 1935. At the same time he issued an order suspending the new tariff schedules until February 3, 1936, and ordered a second hearing concerning the lawfulness of the "contract rate" system. This proceeding was designated "Gulf Intercoastal Contract Rates," Docket No. 294 (R. 6, 14). A second hearing was held before an examiner on October 22 and 23, 1935, at which it was agreed by stipulation that the applicable portions of the record of Docket No. 126 should become part of the record of Docket No. 294. Appellants submitted evidence and filed exceptions to the proposed report of the examiner, and briefs in support thereof (R. 6, 14–15). On January 21, 1936, the Secretary issued a report in which he found the "contract rate" system to be unreasonably preferential and prejudicial in violation of Section 16 of the Shipping Act, 1916 (R. 25–34). The report was accompanied by an order requiring appellants to cancel the contract rates contained in the tariff of October 3, 1935 (R. 34–35). Appellants' petition for a reconsideration of the order of January 21, 1936, was denied on February 1, 1936 (R. 7, 15). On the same day the Secretary postponed the effective date of the order until April 1, 1936 (R. 7, 15).

On March 4, 1936, appellants instituted this suit in the District Court for the District of Columbia to set aside the order of January 21, 1936 (R. 1–9).

The bill of complaint alleged that the "contract rate" system did not violate the provisions of Section 16 of the Shipping Act, 1916, and that the Secretary was without authority to issue the order because Executive Order 6166 (June 10, 1933), which abolished the Shipping Board and transferred its functions to the Department of Commerce, was invalid (R. 7–8).

After a hearing before a statutory three-judge district court, the court on June 29, 1936, filed an opinion and dismissed the bill of complaint (R. 35–42). The final decree was entered on July 15, 1936 (R. 47). On October 26, 1936, the court filed its findings of fact and conclusions of law (R. 42–46). Appellants' petition for appeal, accompanied by an assignment of errors, was filed August 14, 1936 (R. 48–49), and an order allowing appeal and fixing bond was entered the same day (R. 50).

On the same date on which the district court rendered its opinion the Act of June 29, 1936, commonly known as the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1985) became effective. That act created the United States Maritime Commission and transferred to it the functions of the Shipping Board Bureau of the Department of Commerce. By General Order No. 2, dated October 23, 1936, the United States Maritime Commission, pursuant to authority conferred by Section 204 (a) of the Merchant Marine Act, 1936, ordered that all orders and determinations issued by the Department

of Commerce, in the exercise of functions, powers, and duties transferred to the Commission by the Merchant Marine Act, 1936, and which were in effect at the time of that transfer should continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law.[1] The effective date of the order requiring the abandonment of the contract rate system has been postponed until June 1, 1937. In the meantime appellants have permitted both "contract" and "non-contract" shippers to ship at "contract" rates.

ARGUMENT

I

The order of the Secretary of Commerce is supported by substantial evidence

The order issued by the Secretary of Commerce on January 21, 1936, provided (R. 34–35):[2]

> It appearing, That by Suspension Order No. 50, dated September 16, 1935, the Department entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and suspended the operation of said schedules until February 3, 1936; and

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[1] General Order No. 2 was published in The Federal Register, No. 159, October 23, 1936, p. 1917.

[2] Section 22 of the Shipping Act, 1916, c. 451, 39 Stat. 736, provides authorization for the conduct of investigations of violations of the terms of the act and the entry of appropriate orders. See Appendix, *infra*, p. 49.

It further appearing, That a full investigation of the matters and things involved has been had, and that the Department, on the date hereof, has made and entered of record a report stating its conclusions and decisions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules on or before February 3, 1936, upon not less than one day's posting and filing in the manner required by law, and that this proceeding be discontinued; and

It is further ordered, That the cancellations herein ordered may be made in a consecutively numbered supplement to Agent C. Y. Roberts' Tariff SB–I No. 3, without observing the requirements of the Department's tariff rules.

(Signed) DANIEL C. ROPER,
Secretary of Commerce.

The report which accompanied the order (R. 25–34) contained a review of the evidence received at the hearing held upon the suspended rates, and the following findings of fact upon which the order was predicated (R. 34):

* * * it is clear that the real purpose of the suspended rates and rule is to prevent shippers from using the lines of other carriers, and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf.

> The department finds the contract rates system provided for in the schedules under suspension not justified by transportation conditions in the trade involved, and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916.

Section 16 of the Shipping Act 1916, c. 451, 39 Stat. 734, provides that it shall be unlawful for any common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 18 of the Shipping Act, 1916, requires every common carrier by water in interstate commerce to "observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto."

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480, this Court said that "the Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." It is established that a determination of the Interstate Commerce Commission concerning the reasonableness of rates will not be set aside unless it is shown that

the decision of the Commission was not supported by substantial evidence, or that the Commission acted arbitrarily or contrary to law. Where no irregularity appears in the proceedings of the Commission and it has committed no errors of law, its findings of fact made upon substantial evidence are conclusive, and the Court will not undertake to weigh the evidence upon which those findings are made. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481–482; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Ry.* v. *United States*, 272 U. S. 658, 663; *Florida* v. *United States*, 292 U. S. 1, 12; *Atlanta, B. & C. R. Co.* v. *United States*, 296 U. S. 33, 38. No contention is made here that the hearing accorded appellants was not adequate, or that the order of the Secretary invades appellants' constitutional rights. The order merely requires the discontinuance of rate discrimination found to be unreasonable; it does not prescribe the rates to be charged by the appellants, and no question of confiscation arises. Apart from the question of the power of the Secretary to exercise the functions vested by the Shipping Act in the Shipping Board,[3] the only questions presented for the determination of this Court are whether there was substantial evidence to support the findings

[3] The question of the validity of the transfer of the functions of the former Shipping Board to the Department of Commerce is considered *infra*, pp. 40–42.

made by the Secretary and whether the order was authorized by the applicable provisions of the Shipping Act.

Appellants contend that the finding of the Secretary, and the opinion of the District Court, rest upon an unsupported assumption that the contract rate system employed by appellants was unreasonably discriminatory (Appellants' Brief, p. 15, 20). That contention finds no support in the record. In its opinion the court reviewed at some length the evidence upon which the order was based. Not only did the court find the order to be supported by substantial evidence, but it went farther and determined upon an independent analysis of the evidence that a violation of the Shipping Act had been established.[4] Specific findings of fact and conclusions of law made by the court sustain the order of the Secretary (R. 42–46). An examination of the evidence reveals that the findings of the Secretary and the decision of the District Court were clearly justified.[5]

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[4] The Court stated (R. 40):

"Without deciding, therefore, to what extent we are bound by the finding of the Secretary that the practice is discriminatory and violates the provision of Section 16 of the Act, we are of opinion that the admitted and undisputed facts bring the practice within the condemnation of the statute."

[5] It was not a "finding without evidence" and the language used by this Court in *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91, condemning arbitrary administrative action, has no application to this case. Appellants' assignments of error do not attempt to raise any question as to the adequacy of these hearings (R. 48).

Appellants assert that the contract rate system involved no discrimination (Appellants' Brief, pp. 15, 17). Yet their statement of the evidence and of the question involved demonstrate that the system did involve the application of two different sets of rates for the performance of the same service. One tariff schedule was applied to shippers who had entered into contracts undertaking to patronize appellants exclusively in certain shipments, and another schedule of higher rates was applied to shippers who had not entered into such contracts (Appellants' Brief, pp. 11, 12). It cannot be questioned, therefore, that the contract rate system did involve a differentiation in the treatment accorded two classes of shippers.[6] Whether the application of different rates to these two classes of shippers may fairly be said to constitute an unreasonable

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[6] The differentiation is shown clearly by the following excerpt from Appellants' Rule 53, governing the execution of contracts for the exclusive patronage of appellants (R. 53):

"Rule 53. Procedure in Connection with Execution of Contracts at Contract Rates.

"(a) Where specific reference is made to this rule in individual commodity items in this tariff, the rates named in such items are contract rates and in the absence of contracts as provided for in this rule, the rates on such commodities will be ten cents per one hundred pounds or two dollars per ton of two thousand pounds higher than the rates named in such items."

Rule 53 requires that a contract executed by appellants whereby they agree to transport freight at "contract rates" in exchange for the undertaking of the shipper to patronize them exclusively shall contain the following provision for

discrimination is the only question presented in determining whether the order of the Secretary was justified by the evidence and authorized by the Shipping Act.[7]

The finding of the Secretary that the contract rate system was unduly and unreasonably preferential and prejudicial is amply sustained by the evidence. The differential between "contract" and "non-contract" rates for the carriage of the same commodities, between the same ports, was shown to be an arbitrary and unwarranted discrimination between two groups of shippers. The Chairman of the Gulf Intercoastal Conference admitted at the hearing that the same service is rendered by the carrier irrespective of whether a particular con-

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enforcing the compliance of the shipper with the terms of the contract (R. 55):

"If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff non-contract rate or rates of the transporting carriers in force on such commodities at the time of such shipment."

[7] It is urged that there exists a presumption that "a difference in rates is founded upon a difference in conditions and surrounding circumstances" (Appellants' Brief, p. 20). Whether or not such a procedural rule obtains in a hearing ordered by the Secretary, it is clear that before this Court it is for appellants to demonstrate that the order of January 21, 1936, was not supported by substantial evidence. See *Manufacturers Ry.* v. *United States*, 246 U. S. 457, 481.

signment moves under "contract" or "non-contract" rates (R. 65). The physical work performed in one class of shipment is the same as that performed in the other. No greater cost is incurred by the carrier in moving a shipment under "non-contract" than under "contract" rates. On the contrary, any difference in cost would favor the consignment moving under "non-contract" rates because some cost is incurred in handling correspondence relating to the contracts (R. 65). The differential of ten cents for each hundred pounds which is charged shippers who have not executed contracts to patronize Conference lines exclusively was conceded to be an arbitrary figure which represented no additional benefit received by the shipper who pays the higher rate, nor any additional burden borne by the carrier (R. 65). The differential is in effect a penalty which must be paid by the shipper who does not desire to commit to appellants his future consignments, and who desires to remain at liberty to patronize non-conference carriers (R. 66).

It does not follow from the fact that a particular commodity, by action of the Conference, becomes the subject of "contract rates" that there is a reduction in the rate for that item. Rather, the previous rate becomes the "contract rate", and shippers who do not choose to enter into contracts must thereafter pay a higher rate (R. 67). If it be assumed that the previous rate was fair and com-

pensatory, there can be no justification for the arbitrary imposition of a higher rate upon a class of shippers simply because they are not disposed to commit themselves for the future. Whether a commodity is to carry a "contract rate" is decided by the Conference. Usually those items which move regularly and in great volume are selected, although other factors do influence the determination (R. 64).[8] Under these conditions the arbitrary imposition of higher rates upon shippers who wish to retain their freedom to patronize whatever carrier they choose is clearly an undue preference of "contract" shippers, and unreasonably prejudicial of "non-contract" shippers.

Appellants assert that "non-contract" shippers are not unduly prejudiced by the contract rate system because it lies within their power to remove the discrimination against them by executing contracts with the Conference (Appellants' Brief, p. 16). The very statement of that proposition reveals the iniquity of the practice. Equality of treatment which can be secured only through the surrender of the right of the shipper to patronize in the future whatever carrier it pleases obviously is not the equality required by Section 16 of the Shipping Act, 1916. The discrimination against "non-contract" shippers is not rendered qualita-

[8] Although shippers occasionally request that "contract rates" be established in specific items (R. 64), it does not appear that shippers are consulted by the Conference in establishing tariff schedules.

tively more reasonable by the fact that not every commodity is subject to a "contract rate", or by the fact that the shipper could employ routes of transportation other than water carriers operating from Gulf ports (Appellants' Brief, p. 17). The statement that only 382 of the 1,137 items covered by the suspended tariff carried "contract rates" does not reveal the scope of the contract rate system. The fact that the items selected for "contract rates" are those which move regularly and in great volume (R. 64) diminishes the field within which "contract" shippers may select carriers other than members of the Conference.

It is argued that the fact that most of appellants' patrons favor the contract rate system demonstrates "the *absence* of undue prejudice or disadvantage, or of discrimination of any kind" (Appellants' Brief, p. 18). Yet approval of the system is not universal among shippers from the Gulf ports. It was conceded that on one occasion shippers had requested that a commodity be taken from the contract lists in order that they might avail themselves of the services of another carrier at lower rates (R. 64). The Traffic Manager of the International Paper Company stated that if rates, instead of being fixed by the Conference, were determined on the basis of reasonable and free competition, "that would be the healthier situation" (R. 58). The National Cast Iron Pipe Company opposed the system because it had found it impos-

sible to operate thereunder; the company felt that as a result it had been effectively excluded from the Gulf (R. 76) and it now ships from South Atlantic instead of Gulf ports (R. 77). A representative of the Dulien Steel Products Company termed the system "annoying and troublesome as well as unnecessary." He asserted his company operated in competition with others which shipped from Gulf ports and could not afford to ship at "non-contract" rates when his competitors secured "contract" rates (R. 60). The American Cyanamid Company and the Crystal Springs Bleachery also opposed the contract rate system (R. 73).

Whether the contract rate system is unreasonably discriminatory cannot be judged by the number of shippers who, as a matter of policy, favor its continuance. A rate schedule which discriminates unreasonably against a single shipper falls as clearly within the prohibition of Section 16 of the Shipping Act as does one which offends against a great number of shippers. Whether the cancelled schedule is unreasonable must be determined by the fundamental rule to which the rates of all common carriers must conform—identical services must bear identical rates, and differentiation in rates must be reasonably related to difference in service. See *Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, 100; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62.

The terms "unreasonable preference" and "unreasonable prejudice" employed in Section 16 of the Shipping Act should be read in the light of the prohibitions contained in Section 14. That section in effect condemns rate preferences made to any shipper on the basis of the volume of freight offered. Manifestly this provision is designed to protect the shipper of small quantities of freight. Section 14 provides also that it is unlawful for any carrier to discriminate against any shipper because that shipper has patronized another carrier. It was obviously the purpose of Congress in enacting this provision to prevent any carrier from coercing exclusive patronage through the imposition of penalties in the form of higher rates charged shippers who patronized other carriers. Viewed in the light of these objectives it is clear that Section 16 was designed to prohibit the kind of discrimination embodied in appellants' contract rate system.

The suspended tariff schedules also discriminate unreasonably against carriers which are not members of the Conference. At present no carriers other than appellants are regularly engaged in intercoastal trade between Gulf ports and ports on the Pacific Coast (R. 65). There is no real competition among the members of the Conference. Of its three members, only two provide westbound service from Gulf ports (R. 63), and these two alternate in providing weekly service (R. 58). By

binding shippers to patronize the Conference lines exclusively in order to avoid rate discrimination, appellants effectively preclude competition by other lines. A representative of the Conference conceded that the contract system did give its members a competitive advantage with respect to traffic moving from Gulf ports (R. 64) and that its existence did present an obstacle to the successful operation of a competing steamship line (R. 65). The traffic manager of the United States Pipe & Foundry Company, who favored the continuance of the contract system, asserted that so far as the Conference was concerned one of the purposes of the contract system was to force traffic to the Conference lines (R. 57). Officers of two non-Conference steamship lines asserted that it was impossible for other lines to engage in business from the Gulf ports while appellants had by contract secured for themselves the greater portion of the available trade (R. 67, 69). As a result of the operation of the contract system the appellants enjoy a monopoly of the Gulf trade (R. 58, 67). In the period of a year and a half which preceded the first suspension order of the Secretary, more than 63 percent of the total westbound port-to-port tonnage moved under contract rates. In the same time less than one percent of the tonnage which was entitled to a "contract rate" moved at the higher rate because it was not covered by contracts (R. 60).

It is contended that the contract rate system does not discriminate unreasonably against other carriers because under the rules of the Gulf Intercoastal Conference "any carrier regularly engaged in the Gulf intercoastal trade is eligible for membership" in the Conference (Appellants' Brief, p. 17). But a carrier has the right to operate freely without joining the Conference if it desires to do so, and it is no answer to the charge of discrimination to say that a carrier may avoid the effects of discrimination by abandoning that right. Quite apart from this consideration, the right to enter the Conference is largely lacking in substance. The provision of the Gulf Intercoastal Conference Agreement relating to membership (R. 83) is construed by the Conference to mean that a carrier, to be eligible for membership, must actually be engaged regularly in the Gulf intercoastal trade. It must place a ship in operation, book cargo, file rates, and sail the vessel (R. 65). The impossibility of securing sufficient tonnage in the face of the contracts for exclusive patronage held by appellants effectively prevents other carriers from complying with the rule for admission to the Conference (R. 67, 69). The Nelson Steamship Company on two occasions applied for membership in the Conference, but it was in each instance denied admittance because it was unable to meet the requirements imposed (R. 65, 68). Had it not been for the existence of the contract rate system that company

would be employing a number of its idle steamers in the Gulf trade (R. 68).

Appellants' suggestion that any carrier is free to compete in the transportation of those commodities for which no "contract rates" are prescribed (Appellants' Brief, pp. 17–18) affords no protection for non-Conference carriers. The tonnage which moves under "contract rates" is admittedly that which moves most regularly and in greatest volume (R. 64). The remaining tonnage which is shipped through the Gulf ports under "non-contract" rates is not sufficient in volume to permit a competing line to operate profitably (R. 67–68, 69).

Not only does the contract rate operate to discriminate unreasonably among shippers and carriers, but it also operates to favor unduly some Gulf ports over others. Thus it appears that while the system assures a flow of traffic through the port of Mobile (R. 57), it hinders the development of the Lake Charles district because new shipping lines are excluded (R. 75). Moreover, the contract rate system operates to divert trade from Gulf ports to ports in other localities. Traffic which formerly moved through Gulf ports but is excluded by the operation of the system now moves through South Atlantic ports (R. 77).

Appellants rely most strongly in their argument in support of the contract rate system on the premise that it has "been conducive to the maintenance of an efficient and regular service between United

States Gulf and Pacific Coast ports", and that it has remedied the chaotic conditions which existed in the Gulf prior to its inception (R. 19). Most of the testimony introduced by appellants in support of the system was calculated to show that shippers prefer the stability of rates which obtains thereunder (R. 57, 58, 59, 61, 71, 72). While the stabilization of rates and the maintenance of an efficient merchant marine are unquestionably laudable objectives, these ends cannot justify practices which are in direct conflict with the provisions of the Shipping Act by which Congress sought to protect shippers, carriers, and ports from unjust and unreasonable discrimination.[9]

The Shipping Act was designed, as appellants state, to encourage the creation of a merchant ma-

[9] The District Court stated, with reference to appellants' attempt to justify the discrimination embodied in the contract rate system (R. 40–41):

They insist that the preference to their contract shippers is not unreasonable, is offered to all alike, and is reciprocally beneficial—beneficial to the carrier because it insures it a constant flow of remunerative business and beneficial to the shipper because it insures him stability of rate and regularity of service. And all of this may be true. But the unreasonableness of the contract is in the fact that it insures to one shipper who is willing to tie himself up by contract the same service at a cheaper rate than the carrier is willing to extend to another shipper who is not, and thus is effective to coerce all shippers to abandon the advantages of competition or pay a penalty. It is likewise subject to condemnation for this reason.—The rate charged the contract shippers obviously is, from the carrier's point of view, a remunerative rate. This being true, the exaction of a higher rate by 10¢

rine to meet the requirements of the commerce of the United States (Appellants' Brief, pp. 18–19). It was for this purpose that Congress by Section 15 sanctioned agreements and combinations which otherwise would have constituted direct violations of the antitrust laws. Yet Sections 14, 16, and 18 show that great care was taken in drafting the Act to insure that the privileges granted should not be employed to accomplish the evils toward which the antitrust laws were directed.

If the Shipping Act, 1916 does not make effective provision for the recognized needs of an efficient American merchant marine, the remedy, as stated by the District Court,[10] must be accomplished by act of Congress rather than by resort to the

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per cwt. from all other shippers is an undue and unreasonable exaction. It is in effect a penalty.

Not only is this true, but the contract is likewise prejudicial to the "locality", i. e., the Gulf territory, because the tendency is to exclude all competition and create a monopoly in favor of the Conference carriers. The effect of the monopoly is to destroy the checks and balances imposed by free and unrestrained competition; and we cannot doubt that, in forbidding any water carrier from subjecting any locality to unreasonable prejudice or disadvantage, Congress intended to include any act the tendency of which would be to destroy the restraints which competition imposes.

[10] In its opinion the District Court stated (R. 41):

"Here the result of the contract system is a complete, effective, and perpetual bar restraining all other carriers from attempting to serve the public as carriers between Gulf ports and the west coast. Such an imposed monopoly was unreasonable discrimination at common law.—Menacho v. Ward, 27 Fed. 529. It is no less so, under the provisions

courts in an attempt to nullify the safeguards contained in the Act.

That Congress has not been insensible to the necessities of common carriers by water is indicated by legislation enacted subsequent to the Shipping Act, 1916. Direct provision is made in the Intercoastal Shipping Act, 1933, c. 199, 47 Stat. 1425, to prevent such rate wars as those which had theretofore led to chaotic conditions in the Gulf intercoastal trade. Section 2 of that Act requires every common carrier in intercoastal commerce to file with the Shipping Board its rate schedules. Such schedules may be changed only by filing with the Board new schedules which shall not become effective until thirty days have passed. Power is vested in the Board to reject any schedule which is not in consonance with the regulatory provisions of the section. The Chairman of the Gulf Intercoastal Conference and another witness who testified in favor of the contract rate system conceded that the passage of this Act has to some degree eliminated the conditions which led to the adoption

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of the federal statute. In saying this we are by no means unmindful of the problems of the American shipowner. That these problems are pressing to the point of emergency, is obvious to those who have watched the steady decline of American shipping since the period of the World War; and that the problem requires special treatment from Congress is, we believe, universally admitted. The increase and maintenance of the American merchant marine is a subject of national concern, indeed of national safety, but the remedy is political and not judicial."

of the contract rate system (R. 56, 64). Another witness agreed that rate stability would be insured by the Act (R. 77). That the contract rate system is not the sole effective solution to the problems of carriers by water is shown by the testimony of several shippers who stated that they had experienced no difficulty with respect to the service or rates of lines operating from Atlantic ports which do not employ the contract rate system (R. 59, 61).

II

The contract rate system embodied in the schedule ordered canceled cannot be sustained as a matter of law

A. There is no merit in appellants' contention that as a matter of law the contract rate system cannot be said to be unduly discriminatory.

In the third point of their brief, appellants appear to contend that as a matter of law the contract rate system cannot be unreasonably discriminatory because the stability of rates alleged to result from the system constitutes a legal justification for the difference in treatment accorded "contract" and "non-contract" shippers (Appellants' Brief, pp. 19–21).[11]

Appellants' assertion that no attempt was made "*to show that the difference between the contract*

[11] Appellants admit that the mere fact that they have for a long period used the contract rate system does not "clothe it with immunity" (Appellants' Brief, p. 15). Cf. *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 759. While it is contended that the filing of the rates embodied in the contract rate system gave them the force of a statute (Ap-

rates and the non-contract rates is not justified" (Appellants' Brief, p. 21) is palpably without foundation. In the report which accompanied his order, the Secretary, after a review of the evidence, found that the contract rate system was "not justified by transportation conditions in the trade involved, and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916" (R. 34). In this finding the district court concurred (R. 42–46).

The evidence upon which the finding of the Secretary was made has been discussed, *supra*, pp. 12–22. It shows that the differential contained in the contract rate system was based upon no difference in service rendered to the shipper, or upon any difference in cost to the carrier, but that it was an arbitrary exaction levied upon shippers to compel them to patronize the Conference lines. Indeed, appellants make no serious attempt to justify the system on the ground that the differential had any relation to the service performed. Instead, they assert that "the circumstances surrounding the application of the contract and non-contract rates" are dissimilar (Appellants' Brief, p. 21).

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pellants' Brief, p. 15), it is clear that the mere fact of filing made them legal rates only until appropriate proceedings were taken by the Secretary to determine their lawfulness. In *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 384, this Court distinguished between "legal" rates and "lawful" rates. On filing, rates became "legal", but ". . . the legal rate was not made by the statute the lawful rate—it was lawful only if it was reasonable."

Whether there were differences in the circumstances under which "contract" and "non-contract" rates were charged is a question of fact to be determined in the first instance by the Secretary. Only if his conclusion finds no reasonable support in the evidence will it be set aside by the courts. It is submitted that the finding of the Secretary was not only justified, but that it was, as determined by the district court (R. 40), required by the evidence.

The "dissimilarity of circumstances" upon which appellants rely is said to consist in the assurance received by the appellants in contracts executed by shippers of *"sufficient traffic to maintain a regular service, minimize waste or unused cargo space, and thus warrant the contract rate"* (Appellants' Brief, p. 21). Aside from the question of the capacity of the contracts to produce this result,[12] clearly that circumstance affords no legal

[12] The contracts executed by "contract" shippers contain merely an *estimate* of the approximate number of carloads of commodities of all descriptions subject to "contract rates" to be shipped during the period of six months or a year during which the contract is effective (R. 54). The shipper does not undertake to provide any specific quantity of tonnage in consideration for the receipt of a lower rate. The contract does not prescribe the rate at which the commodities will be delivered to the carrier. It gives no indication of the precise time during the contract period of a year or six months at which the bulk of the commodities will be shipped. The incapacity of the contracts to afford the carrier accurate advance information concerning the flow of "contract" tonnage is indicated by the proviso contained

basis for rate discrimination. Efficiency of operation which is achieved through the employment of coercive tactics to induce patronage by shippers and through the exclusion of competing carriers can never provide a reasonable ground for differences in rates.[13]

Neither of the two cases on which appellants rely afford legal support for the contract rate system. In *Interstate Commerce Commission* v. *B. & O. Railroad,* 145 U. S. 263, this Court held that the practice of a railroad in issuing "party-rate" tickets, under which a group of individuals might travel on a single ticket at a reduced rate, did not unduly discriminate against individual

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in the contracts to the effect that the carriers undertake to transport the goods of the shipper only when cargo space is available at the time request is made therefor by the "contract shipper" (R. 54). In view of these considerations there is ample ground for concluding that the advantage derived by the carrier from the contract rate system lies in exclusion of competing carriers rather than in any resulting greater efficiency in the allocation of cargo space.

[13] Appellants seek to justify the higher rate imposed upon "non-contract" shippers by saying that it "applies only to that class of shippers who refuse to cooperate to maintain a regular and stable service and who prefer to speculate upon the possibility that a tramp steamer may be available with a cut rate when they have a shipment to move. If they lose by their speculation they have only themselves to blame" (Appellants' Brief, p. 21). It is submitted that "non-contract" shippers are fully entitled to patronize whatever carrier they may select, and that appellants cannot lawfully compel them to "cooperate" with the Conference lines by the imposition of penalties for failure to patronize those lines exclusively.

travelers who were required to pay the regular fare. The circumstance which was held to justify rate differentiation was the increased travel which was induced by such tickets. No suggestion is made by appellants that the contract rate system is calculated to induce patrons to ship a greater volume of freight than they would normally ship.[14] The "contract rates" are not reduced rates; where a commodity becomes subject to such rates, the only change is the imposition of a penalty upon shippers who decline to commit their patronge to appellants exclusively (R. 67).

United States v. *Illinois Cent. R. R.*, 263 U. S. 515, is the other decision cited by appellants in support of their contention. In that case a shipper alleged that it had been subjected to undue discrimination in freight rates. The shipper was situated at a non-competitive point on an independent branch line in an area from which a "blanket rate" was effective on through freight moving to northern markets. To maintain the "blanket rate" the defendant railroad habitually absorbed the charges of connecting branch lines within the area. In the case of the plaintiff the defendant declined to absorb the charges of the branch line and imposed a

[14] If the contract rate system did constitute a reduction of rates on the basis of quantity of tonnage offered, it would come into conflict with Section 14 of the Shipping Act, which prohibits the making of any contract whereby any shipper is accorded preference on the basis of the volume of freight offered.

higher rate than that charged other shippers of the area. Such differentiation was held to constitute an undue discrimination. In that case the carrier sought to justify the discrimination in rates on the ground that where competition did not so require, it should not be compelled to absorb the allowance made to the branch line for its services. In sustaining the determination of the Interstate Commerce Commission that the discrimination was unwarranted, the Court stated (pp. 523–525):

> The effort of a carrier to obtain business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 122. *Self-interest of the carrier may not override the requirement of equality in rates.* [Italics supplied.]
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> The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to

be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920.

Likewise, in this case it cannot be said as a matter of law that the Secretary erred in finding the contract rate system to be unduly discriminatory. The Secretary was bound to consider not only the increased efficiency in the operation of the Conference lines which might be attributed to the contract rate system, but also its capacity to curtail the freedom of shippers to patronize other carriers, and the attendant deprivation of other carriers of their right to compete with appellants in the Gulf intercoastal trade. It was the purpose of Congress in enacting the Interstate Commerce Act to insure equality of treatment for all shippers by rail. *Union Pacific Railway* v. *Goodridge,* 149 U. S. 680, 690–691; *New Haven R. R.* v. *Interstate Com. Comm.,* 200 U. S. 361, 391; *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155, 166; *United States* v. *Union Stock Yard,* 226 U. S. 286, 307. The same protection was extended to shippers by water by the Shipping Act, 1916. *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 480–481.

Even under the principles of the common law such discrimination as that practiced here by appellants has been held to be unreasonable.[15] The

[15] The requirement of reasonableness contained in Section 16 of the Shipping Act, 1916, is declaratory of the common

case of *Menacho* v. *Ward*, 27 Fed. 529 (C. C. S. D. N. Y., 1886), presents a question almost identical to that involved here. There suits were instituted by shippers to restrain two steamship lines from habitually imposing higher rates upon shippers who declined to patronize the defendants exclusively than were charged shippers who agreed to give defendants their entire trade. As in this case, the defendants operated under a joint traffic agreement and were the only carriers regularly engaged in the transportation of freight from New York to Cuba. The defendant lines, like appellants in this case, sought to justify the practice of rate discrimination on the ground it had been found necessary in order to secure sufficient patronage. The Court placed upon defendants the duty to demonstrate the reasonableness of the discrimination in rates, saying (p. 532):

> The fact that the carrier charges some less than others for the same service is merely

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law. It has been held that the Interstate Commerce Act, insofar as it prohibited unjust and unreasonable rates, was an adoption by Congress of common law principles. *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479, 494; *Tift* v. *Southern Ry. Co.*, 123 Fed. 789, 792 (C. C. Ga., 1903); *United States* v. *Hanley*, 71 Fed. 672, 673 (D. C., N. D. Ill., 1896). Appellants have pointed out that Section 16 of the Shipping Act, 1916, employs language which is virtually identical with that of section 3 of the Interstate Commerce Act (U. S. C., Tit. 39, Sec. 3), which declares unlawful "any undue or unreasonable preference or advantage" or "any undue or unreasonable prejudice or disadvantage" (Appellants' Brief, p. 20).

> evidence for the latter, tending to show that he charges them too much; but, when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

The Court determined that the difference in rates could not be justified as discounts made to regular patrons for shipments in quantity because, as here, the discrimination bore no relation to the quantity of trade offered by the individual shipper, but depended entirely upon his employment of defendants exclusively. In granting injunctive relief to the shippers, the Court said (p. 534):

> The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it

will result practically in giving the defendants a monopoly of the carrying trade between these places. *Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious.* [Italics supplied.]

B. Previous determinations of the Shipping Board Bureau are not inconsistent with the decision that the contract rate system employed by appellants is unreasonably discriminatory

Appellants contend that because the Shipping Board Bureau of the Department of Commerce has, in an earlier proceeding, approved the use of a contract rate system by carriers engaged in foreign commerce, it is required to approve the appellants' employment of a contract rate system in intercoastal trade (Appellants' Brief, pp. 22–25). Assuming for the moment that the situation presented in *W. T. Rawleigh Company* v. *Stoomvaart, et al.*, 1 U. S. S. B. B. 285, was analogous to that here involved, appellants err in contending that a determination of the Shipping Board Bureau establishes a conclusive precedent which cannot be modified or overruled by later decisions. An order issued by an administrative officer prescribing rates is not *res judicata*, and it may be superseded by a later order. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445. Likewise, the finding of a regulatory body as to the reasonableness of rates establishes no binding precedent.

Thus in *Virginian Ry.* v. *United States,* 272 U. S. 658, in answer to the contention that an order of the Interstate Commerce Commission was inconsistent with an earlier determination, this Court stated (pp. 665–666):

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency with findings made in other proceedings before it. Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541. (Italics supplied.)

This Court has declined to take jurisdiction of a suit instituted under the antitrust laws against steamship lines which had entered into a combination, on the ground that a previous decision of the Shipping Board that a similar combination was illegal did not conclusively establish the illegality of the combination in question. *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474. In holding that the question should be presented first to the Shipping Board, the Court said (p. 488):

> Whatever might be the rule to be applied under other circumstances, we are of opinion that in the state of the present record the ordinary primary jurisdiction of the board has not been superseded by its decision in the

> *Eden* case. To hold otherwise would be to create the doubtful, and perhaps dangerous, precedent that a decision of the board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to all other agreements alleged to be of a similar character, although it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result.

Turning to a consideration of the decision of the Bureau in the *Rawleigh* case, it becomes obvious on an examination of the report of the Secretary (R. 33) that it can provide no precedent for the determination of this case because the circumstances of that case differ widely from those here involved. The contract rate system involved in the *Rawleigh* case was employed in foreign, rather than in intercoastal, commerce. This fact alone constitutes a fundamental basis for distinction. As pointed out by the Secretary (R. 33), no such regulatory provisions as those contained in the Intercoastal Shipping Act, 1933, exist with respect to foreign commerce. Stability of trade conditions must be maintained, if at all, by cooperation among carriers. It is the presence of foreign competition which introduces uncertainty in foreign commerce. Unlike intercoastal carriers, those engaged in foreign commerce must compete with foreign carriers.

The very existence of such American carriers depends upon their ability to meet effectively the competition of foreign carriers. Whatever may be the situation presented in foreign commerce, there can be no justification for the use made by appellants of the contract rate system in the field of intercoastal commerce. Even within the field of foreign commerce, the Secretary has given no blanket approval of the contract rate system.[16]

A further distinction observed by the Secretary (R. 33) is to be noted in the fact that in this case there exists virtually no competition among the appellants (R. 58, 63), while in the *Rawleigh* case there were eleven carriers competing for the business of shippers. The monopolistic condition which exists in the Gulf intercoastal trade was, therefore, not involved in that case. Clearly that factor is one of great importance in determining whether rate differentiation occasions undue hardship since in its presence the equalizing effect of wholesome competition is absent.[17]

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[16] In the report which accompanied his order the Secretary stated (R. 33):

"It should be understood that the department is not here sanctioning all contract rate systems in foreign commerce. Whether any such system is lawful is a question which must be determined by the facts in each case."

[17] It was in recognition of this fact that the District Court stated in its opinion (R. 41):

An analogy more closely resembling the present case is afforded by the decision of the United States Shipping Board in *Eden Mining Company* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41. In that case shippers complained to the Board concerning the practice of the defendant carrier of charging shippers who declined to enter into contracts to patronize the defendant exclusively higher rates than those charged shippers who did execute such contracts for the transportation of freight from New Orleans to Nicaragua. As in the present case, such contracts were available to all shippers, and the "contract rate" was granted without regard to the volume of freight offered by the shipper. The defendant carrier was the only line which operated regularly between New Orleans and Nicaragua, a circumstance which also resembles the present case. Like the appellants here, the defendant sought to justify the discrimination in rates on the ground that by reason of the contracts for exclusive patron-

"The effect of the monopoly is to destroy the checks and balances imposed by free and unrestrained competition; and we can not doubt that, in forbidding any water carrier from subjecting any locality to unreasonable prejudice or disadvantage, Congress intended to include any act the tendency of which would be to destroy the restraints which competition imposes."

age it was able to adjust the service supplied to the tonnage available with a greater degree of efficiency than would be possible without such contracts. In deciding that the contract rate system employed by defendant constituted a violation of Section 16 of the Shipping Act, 1916, the Board rejected the contention that all shippers were treated equally because all were afforded equal opportunity to contract, saying (p. 46):

> Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

After concluding that the practice of defendant constituted an unjust discrimination between shippers, the complaint was dismissed upon a showing that the violations had been discontinued.

III

The Secretary of Commerce was lawfully authorized to exercise the powers formerly vested in the Shipping Board

Appellants contend that Executive Order 6166, which abolished the United States Shipping Board

and transferred its functions to the Department of Commerce, was invalid (Appellants' Brief, pp. 25–27). The basis for this contention appears to be that the Shipping Board was not an executive agency within the meaning of Title IV of the Legislative Appropriation Act of June 30, 1932, and that therefore that Act did not authorize the President to abolish the Shipping Board and transfer its functions to the Department of Commerce (Appellants' Brief, p. 26). The same contention was urged upon this Court in *Isbrandtsen-Moller Co., Inc.*, v. *United States*, No. 307, October Term, 1936, and was answered in the brief submitted on behalf of the United States in that case. The Court is respectfully referred to that brief, and particularly to pages 38–61 thereof.

In summarizing their contention on this point, appellants completely ignore the fact that irrespective of what Congress may have originally intended when it enacted Title IV it has subsequently, by a series of laws, recognized and approved the action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce.[18] The latest expression of congressional approval is found in the Merchant Marine Act, 1936, 49 Stat. 1987, which specifically refers to the functions of the United

[18] These statutes are described and discussed on pages 52–61 of the brief submitted on behalf of the United States in *Isbrandtsen-Moller Co. Inc.* v. *United States*, No. 307, October Term, 1936.

States Shipping Board as "now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933."[19]

CONCLUSION

For the foregoing reasons the decree of the District Court of the United States for the District of Columbia should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
GOLDEN W. BELL,
Assistant Solicitor General.
HUGH B. COX,
WENDELL BERGE,
Special Assistants to the Attorney General.
JOHN C. HERBERG,
MAURICE L. A. GELLIS,
Special Attorneys.
R. H. HALLETT,
Assistant Counsel,
United States Maritime Commission.

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[19] Section 204 (a) of the Merchant Marine Act, 1936, follows:

"Section 204. (a) All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, and amendments to those Acts, and now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933, are hereby transferred to the United States Maritime Commission; * * *."

APPENDIX

SHIPPING ACT, 1916

The pertinent provisions of the Shipping Act, 1916 (September 7, 1916, c. 451, 39 Stat. 738, as amended; U. S. C., Tit. 46, Secs. 801, *et seq.*) provide:

[Section 1]

Section 801. Terms defined. When used in this chapter:

* * * * *

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

* * * * *

* * * (Sept. 7, 1916, c. 451, § 1, 39 Stat. 728; July 15, 1918, c. 152, § 1, 40 Stat. 900.)

* * * * *

[SECTION 14]

§ 812. Rebates and discriminations by carriers by water prohibited; use of "fighting ship". No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or

resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996).

* * * * *

[SECTION 15]

§ 814. *Contracts between carriers filed with board.*—Every common carrier by water, or other person subject to this chapter, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or

restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action (Sept. 7, 1916, c. 451, § 15, 39 Stat. 733).

[Section 16]

§ 815. *Discriminatory acts prohibited.*—It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734).

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[Section 18]

§ 817. *Carriers to establish, observe, and enforce reasonable rates and regulations.*— Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735).

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[Section 22]

§ *821. Complaints to board and investigations.*—Any person may file with the board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter (Sept. 7, 1916, c. 451, § 22, 39 Stat. 736).

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[Section 31]

§ 830. Venue and procedure in suits to enforce, suspend, or set aside orders.—The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties (Sept. 7, 1916, c. 451, § 31, 39 Stat. 738).

INTERCOASTAL SHIPPING ACT, 1933

The pertinent provisions of the Intercoastal Shipping Act, 1933 (March 3, 1933, c. 199, 47 Stat. 1427; U. S. C., Tit. 46, Secs. 843 *et seq.*), provide:

[Section 1]

§ 843. Definitions. When used in this chapter—

The term "common carrier by water in intercoastal commerce" for the purposes of this chapter shall include every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal (Mar. 3, 1933, c. 199, § 1, 47 Stat. 1425).

[Section 2]

§ 844. Schedule of rates; filing; posting; penalties for violations.—Every common carrier by water in intercoastal commerce shall file with the United States Shipping

Board and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. The schedules filed and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee. Such carriers in establishing and fixing rates, fares, or charges may make equal rates, fares, or charges for similar service between all ports of origin and all ports of destination, and it shall be unlawful for any such carrier, either directly or indirectly, through the medium of any agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any such carrier from extending service to any publicly owned terminal located on any improvement project authorized by the Congress at the same rates which it charges at its nearest regular port of call. Such schedules shall be plainly printed, and copies shall be kept posted in a public and conspicuous place at every wharf, dock, and office of such carrier where pas-

sengers or freight are received for transportation, in such manner that they shall be readily accessible to the public and can be conveniently inspected.

No change shall be made in the rates, fares, or charges, or classifications, rules, or regulations, which have been filed and posted as required by this section, except by the publication, filing, and posting as aforesaid of a new schedule or schedules which shall become effective not earlier than thirty days after date of posting and filing thereof with the board, and such schedule or schedules shall plainly show the changes proposed to be made in the schedule or schedules then in force and the time when the rates, fares, charges, classifications, rules, or regulations as changed are to become effective: *Provided*, That the board may, in its discretion and for good cause, allow changes upon less than the period of thirty days herein specified: *And provided further*, That schedules or changes which provide for extension of actual service to additional ports at rates of said carrier already in effect for similar service at the nearest port of call to said additional ports shall become effective immediately upon notice to the board.

From and after ninety days following March 3, 1933, no person shall engage in transportation as a common carrier by water in intercoastal commerce unless and until its schedules as provided by this section have been duly and properly filed and posted; nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any

service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the board and duly posted and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such schedules.

The board shall by regulations prescribe the form and manner in which the schedules required by this section shall be published, filed, and posted; and the board is authorized to reject any schedule filed with it which is not in consonance with this section and with such regulations. Any schedule so rejected by the board shall be void and its use shall be unlawful.

Any violation of any provision of this section by a common carrier by water in intercoastal commerce shall be punished by a fine of not less than $1,000 nor more than $5,000 for each act of violation and/or for each day such violation continues, to be recovered by the United States in a civil action (Mar. 3, 1933, c. 199, § 2, 47 Stat. 1425).

[Section 3]

§ 845. Same; changes in rates; hearings on new schedules; suspension of rates pending hearing. Whenever there shall be filed with the board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the board shall have, and it is hereby given, authority, either upon complaint or upon its

own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice: *Provided, however,* That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. The board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible. Nothing contained herein shall be construed to empower the

board affirmatively to fix specific rates (Mar. 3, 1933, c. 199, § 3, 47 Stat. 1426).

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[Section 5]

§ 847. *Application of chapter 23 to intercoastal shipping.* The provisions of chapter 23, and as amended prior to this chapter, shall in all respects, except as amended by this chapter, continue to be applicable to common carriers by water in intercoastal commerce (Mar. 3, 1933, c. 199, § 5, 47 Stat. 1427).

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